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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

COMMENTS OF FOCAL COMMUNICATIONS

I. Introduction

Focal Communications Corporation ("Focal") respectfully urges the Commission to fully incorporate the fundamental goal of the 1996 Act -- " ... to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans" -- in carrying out the Supreme Court's mandate in this proceeding.[1] The Court expressly directed the Commission to "tak[e] into account the *objectives of the Act* and giv[e] some substance to the 'necessary' and 'impair' requirements". [2]

Accordingly, the Commission should make advancement of facilities-based competitive investment its primary principle for giving effect to the Supreme Court's remand, and it should apply this principle by declaring that unbundled switching will not be available in areas where competitors have demonstrated the ready availability of

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1 House Conf. Rep. No. 104-458, 104th Cong., 2d Sess., p. 113 (1996).

2 AT&T v. *Iowa Utilities Board*, 119 S. Ct. 721 at 725 (1999).

switching through self-provisioning. The best and simplest test of switch self-provisioning (determined geographically at the level of NXX V & H coordinates) is the presence of a CLECs' NXXs in the LERG.

Focal acknowledges that not even carriers with the deepest pockets – including AT&T or a BOC (outside its own service territory) – have been willing or able to duplicate the public switched network's full, ubiquitous system of local loops outside of densely-populated areas. Because efficient and reasonably-priced access to the BOCs' bottleneck loops is needed to put competitive services within the reach of ordinary consumers or small businesses, these functions must remain UNEs. And because the same situation also applies to switching in some areas, access to incumbent switches in those areas is appropriate as well.

But the situation is very different in areas where CLECs are self-provisioning switches. First, the very existence of switch-based CLECs suggests that the "impair" standard may not be met for ILEC switching. Second – and of equal importance – requiring switch-based CLECs to compete with unbundled ILEC switching would be completely inconsistent with the Act's goal of encouraging facilities-based competition. This is because some parties seek to price unbundled switching at TELRIC levels that would capture the economies of scope and scale of the incumbents – economies that CLECs would be hard pressed to match during their market entry.[3] Accordingly, the Commission would not be faithful to the Court's remand if it failed to exclude unbundled switching as a UNE in those locations where it is currently being self-provisioned

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[3] *See Southwestern Bell* v. *FCC*, 153 F.3d 523 (1998), where the Eighth Circuit held that the CLECs' challenge to the pricing of unbundled switching using ILEC economies of scope and scale was premature.

II. The Legal Standard Should Be Based On the Practicality and Economics of Provisioning Network Elements, Including Obtaining them from Sources Independent of the ILEC.

The Supreme Court instructed the Commission that, in deciding what UNEs must be available, it must consider "the availability of elements outside the incumbent's network." Focal firmly believes that this criteria can be developed into a workable standard based on how the telecommunications market -- and CLEC deployment of infrastructure -- has evolved to date. The "necessary" and "impair" standards of §251(d)(2) should reflect this economic reality. State decisions to this effect should be considered as well.

The Commission should determine that access to a network element is "necessary,"[4] or its absence would "impair" the ability of competitive LECs to provide service, based on the extent to which obtaining a network element from sources independent of the ILEC, or self-provisioning, would significantly increase the cost of the element to the competitor, diminish the quality of service it could provide, or delay the provision of service. Because even start-up competitors have been able to deploy an impressive array of network infrastructure, the Commission should tailor its inquiry to the scope of availability of possible substitutes for network elements obtained from incumbent LECs, *i.e*, the extent to which elements are available from independent sources with the same ubiquity as incumbent-provided network elements.

Under this approach, for example, the Commission could determine that access to a proprietary network element is "necessary" when its unavailability as a UNE would

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[4] Focal believes that under the Act, "necessary" only applies to "proprietary" network elements. The language of Section 251(d)(2)(A) can only reasonably be interpreted in this fashion. Moreover, there is nothing in the statute or its legislative history pointing to any congressional intent that "proprietary" should be given an expansive interpretation. Therefore, in establishing its list of minimum UNEs the Commission need only apply the "necessary" standard to proprietary network elements.

make it impossible, as a matter of practicality and economics, for the competitor to provide a service. The Commission could determine that the unavailability of a network element from an incumbent would "impair" a competitors' ability to provide service when that would, as a matter of practicality and economics, materially or significantly lessen its ability to provide a service. This approach would establish definitions of "necessary" and "impair" that would establish genuine limits on the availability of UNEs. It would therefore comply with the Supreme Court decision.

Finally, when the Act was amended in 1996, Congress enlisted state support for the effort to open markets to local competition. State PUCs have key responsibilities related to opening local telecommunications markets. The PUCs now preside over an entire range of dockets, from UNE cost proceedings to interconnection agreement arbitrations. Clearly, the PUCs are key observers of the realities of the local exchange markets. Thus, PUC decisions accounting for whether a CLEC can or cannot realistically reconstruct or use alternative network elements are entitled to deference.

III. Application of Standards

A. Competitors Should Have Access to Switching in Noncompetitive Areas

A CLEC cannot realistically offer switching in all areas. Neither can it purchase switching from alternative sources in most areas. Focal therefore proposes that switching remain a UNE in any V&H where a CLEC has not deployed a switch.

As noted above, the situation is very different where CLECs are self-provisioning switching. First, there do not appear to be significant obstacles to CLECs raising the capital to purchase switches with the proper business plan and experience. Focal was a start-up company with almost no business three years ago, yet Focal has been able to raise almost two hundred million dollars from the venture capital and high-yield markets, and now provides metropolitan Chicago, New York, Boston, Washington, Los Angeles, San Francisco, and Philadelphia with services from seven operating switches, with additional facilities planned for the near future. The point here is not to pat Focal

on the back, but to point out that the "impair" standard does not appear to apply to switching, at least in some geographic areas.

Second, it would contradict the Act's goal of furthering facilities-based competition to make ILEC unbundled switching compete with CLEC switching in the same area. This contradiction would exist under almost any terms for the ILEC unbundled switching, but it is particularly obvious given the claims of some parties that unbundled switching should be priced at TELRIC rates that fully capture the incumbents' immense economies of scope and scale. By limiting unbundled switching to areas where CLEC self-provisioning does not exist, the Commission would be honoring Congress' goal to foster facilities-based competition.

Third, the efforts of some parties to combine UNEs into services that resemble ILEC retail services already available to CLECs pursuant to section 251(c)(4) is well known to the Commission, the most prominent example being the "UNE-platform." Focal has no objection to the provision of such services, but only at the wholesale discount provided by Congress. Making ILEC unbundled switching available in areas served by CLEC switching would thus be illegal if CLECs were able to combine it with other UNEs at TELRIC into functionalities resembling resold services, and thereby destroy the distinction in pricing standards created by Congress in sections 252(c)(3) and 251(c)(4).[5]

The best direct measure of whether CLEC switching is operationally available within a given area is the existence of a CLECs' NXX in the national LERG data base. Because every NXX has a geographic area associated with it (the "V&H"), the LERG provides a simple and objective test of the presence of CLEC switching in any area.

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[5] State PSCs in New York, Texas, and other jurisdictions have under consideration plans that would permit provisioning of UNE-platform to targeted markets where competition might not otherwise emerge as quickly. Focal has no objection to such targeted uses of UNE-P, provided they are accompanied by near-term sunset provisions.

Any ILEC receiving a request for unbundled switching should be allowed by the Commission's rules to exclude such an area from its obligation to provide unbundled switching in an interconnection agreement.

B. Local Loop

Without fair and nondiscriminatory access to unbundled loops, CLECs will remain hamstrung in their endeavor to offer a choice of competitive services on a wide scale. The market has demonstrated that new entrants cannot deploy loops in any appreciable volume. As a result, access to the incumbent local loop UNE remains essential.[6]

Obviously, to some extent, every network element could be duplicated independent of the ILEC if time and resources were not a factor. The task of replicating the local loop, however, is immense by any measure. A CLEC wishing to use its equipment to reach all customers in a given service area would need to obtain necessary approvals for rights-of-way, building access, and construction, and ultimately invest substantial sums of money over many years to establish wireline loops that would almost certainly run alongside those already deployed by RBOCs and other ILECs. The burden is not novel. Indeed, incumbent loop networks constitute the classic illustration of economies of scale, because no entity at any time could be expected to deploy loops profitably on a wide scale.[7] Instead, CLECs have relied on regulation and a rate base to finance their deployment.

The Supreme Court instructed the Commission that, in deciding what UNEs must be available, it must apply "some limiting standard, rationally related to the goals of the

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[6] While Focal does not emphasize local loops in its current business plans, it anticipates making ever greater use of loops as its business matures.

[7] As the Commission's *Local Competition Order* observed, competitors would be forced to make a large, sunk investment in loop facilities before they had a customer base large enough to justify the expenditure. *Citation.*

Act." The Court directed the Commission to consider "the availability of elements outside the incumbent's network."

Although incumbents have faced some competition, they know that no entity can profitably reproduce the local loop. Thus, they are in a position to exploit their captive customers — and discriminate against competitors seeking to serve those same customers — by maintaining a stranglehold over this element of the local network. Left to their own devices, ILECs will not offer CLEC access to loop facilities on terms that encourage technical development and efficient investment in telecommunications networks. ILECs obviously have no incentive to cooperate with competitors who can be formidable competitors in downstream markets. Instead, as rational economic actors, ILECs would raise the price of loops above economic levels and use loop revenues to cross-subsidize the more competitive elements of their businesses. Because the loop is the only means of access to many customer premises, local competition suffers.

Relying on incumbents to provide competitors with full, fair, non-discriminatory, and economically reasonable access to loops becomes especially pivotal as CLECs roll out xDSL technology. But if the ILECs are allowed to control bottleneck networks, the prospect of competitive high-speed access for tens of millions of consumers would be placed in doubt.

The lingering incentives to disrupt CLEC business plans are all the more disturbing considering the state-of-the-art network equipment in which CLECs have invested. Judging from their drive, as well as ability to get financing, CLEC efforts should directly translate into a greater competitive environment. However, CLEC investment — and viability — is substantially diminished if they cannot utilize their networks to their fullest potential. The Commission must assure that incumbents cannot keep these potential benefits from end-users because of their control of the "last mile."

C. Competitors Should Have Nondiscriminatory Access to Operations Support Systems

CLECs cannot effectively participate in the local telecommunications marketplace if they cannot order, provision, and maintain network elements for CLEC customers on a timely basis. End-users who want CLEC services should be able to obtain them at the same time and level of convenience as they would obtain services from the incumbent LEC. As the *Local Competition Order* explained, without access to available telephone numbers, service interval information, and maintenance histories, competing carriers would be at a significant disadvantage.[8] Similarly, in order to be competitive, competing carriers should be able to perform the functions of pre-ordering, ordering, provisioning, maintenance, repair and billing in substantially the same manner as the ILEC can for itself.[9]

Recent history shows the importance of access to OSS. CLEC customers who have experienced difficulties in switching to competitive services — even when the problems are caused by the ILEC — have and will quickly retreat to ILEC. Accordingly, the unavailability of access to OSS as a UNE would impair CLECs' ability to provide competitive services and, as such, it should be designated as a UNE.

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[8] CC Dockets 95-185, 96-98, *§ 518.*

[9] *Id.*

IV. Conclusion

For the reasons discussed above, Focal respectfully requests that the Commission's list of UNEs to which competitors should have nondiscriminatory access include the local loop, OSS, and also switching, but prays that switching be excluded from the list in all competitive areas as described above.

Respectfully submitted,

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May 26, 1999

CERTIFICATE OF SERVICE

I, Richard Metzger, hereby certify that I have on this 26th day of May, 1999, served copies of the foregoing Comments of Focal Communications Corporation in CC Docket 96-98, on the following via hand delivery:

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